No. 79-1904

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

KENAI PENINSULA BOROUGH,
Petitioner

v.

STATE OF ALASKA, *et al.*,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF OF KENAI PENINSULA BOROUGH

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QUESTION PRESENTED FOR REVIEW

Are revenues derived from federal oil and gas leases covering the Kenai National Moose Range, Alaska (a reserved land Federal Wildlife Refuge) to be distributed pursuant to 16 U.S.C. § 715s (The Wildlife Refuge Revenue Sharing Act), which allocates 25 per cent of such revenue to the county in which the refuge is located (The Kenai Peninsula Borough) and 75 per cent to the Federal Government for management of the wildlife refuge systems; or, are such revenues to be distributed pursuant to 30 U.S.C. § 191, (The Mineral Leasing Act of 1920), which allocates 90 per cent of such revenues to the State of Alaska and 10 per cent to the United States Treasury? *

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* Additional parties involved are: Cecil D. Andrus, Secretary of the Interior, D. William Miller, Secretary of the Treasury and the Comptroller General of the United States, all of whom are petitioners in 79-1980 which has been consolidated with this case.

MOTION FOR LEAVE TO FILE REPLY BRIEF

Pursuant to Supreme Court Rule 35.3 Kenai Peninsula Borough moves this Court for leave to abridge the time for filing its Reply Brief.

Argument in this matter is set for January 13, 1981. The brief of Appellees, State of Alaska, was received by counsel for Kenai Peninsula Borough January 2, 1981. Because of the limited time available, it is impossible for Kenai Peninsula Borough to place its Reply Brief in the hands of the printer in a time sufficient for filing of the brief within the time required under rule 35.3.

For the reasons stated leave is requested for an order abridging the time for filing the Reply Brief.

DATED this 9th day of January, 1981 at Anchorage, Alaska.

CRANSTON, WALTERS & DAHL
Attorneys for
Kenai Peninsula Borough

By: /s/ Charles K. Cranston
CHARLES K. CRANSTON

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	(i)
MOTION FOR LEAVE TO FILE REPLY BRIEF	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
A. Proceedings in Court Below	1
B. Statement of Facts	3
ARGUMENT	6
1. ALASKA MISINTERPRETS THE "PLAIN MEANING" OF THE WILDLIFE REFUGE REVENUE SHARING ACT, 16 U.S.C. § 715s	6
2. THE LEGISLATIVE HISTORY OF THE 1964 AMENDMENT TO 16 U.S.C. § 715s DOES NOT SPEAK, ONE WAY OR THE OTHER TO THE ISSUE OF IMPLIED REPEAL	7
3. PAST ADMINISTRATIVE PRACTICE PROVIDES NO STANDARD BY WHICH TO INTERPRET 16 U.S.C. § 715s	8
4. THE POSSIBILITY THAT THE EXECUTIVE BRANCH MAY DRAW PUBLIC LANDS FOR WILDLIFE REFUGES CANNOT AFFECT THE INTERPRETATION OF 16 U.S.C. § 715s	8
5. THERE IS NO CONFLICT BETWEEN 16 U.S.C. § 715s AND THE ALASKA STATEHOOD ACT	9
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Udall v. *Tallman*, 380 U.S. 1 (1965) 3, 8
United States v. *Wiltberger*, 5 Wheat. 76, 95-96, 5 L. Ed. 37, 42 (1820) 7
Enfield v. *Kleppe*, 556 F. 2d 1139 (10th Cir. 1977) .. 8

STATUTES

16 U.S.C. § 715s 1, 2, 3, 4, 5, 6, 7, 8, 9, 10
16 U.S.C. § 715s (g) 2 3
16 U.S.C. § 715s (g) 3 3
30 U.S.C. § 181 ..... 2, 4, 6, 7, 9
30 U.S.C. § 191 ..... 6, 7, 9
30 U.S.C. § 352 6
Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339 9

LEGISLATIVE HISTORY

27th Congress, 2d Session 7
88th Congress, 2d Session 7

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REPLY BRIEF OF KENAI PENINSULA BOROUGH

STATEMENT OF THE CASE

A. Proceedings in Court Below

This case involves consolidated suits by the Kenai Peninsula Borough, an Alaska county type municipal corporation (hereinafter "Kenai"), and the State of Alaska (hereinafter "Alaska") against the Secretary of the Interior and other Federal officials for declaratory relief and writs of mandate (R. 1; 14). Kenai sought a declaratory judgment that revenue derived from Federal oil and gas leases covering the Kenai National Moose Range, a reserved land national wildlife refuge, be allocated pursuant to 16 U.S.C. § 715s (The Wildlife Refuge

Revenue Sharing Act). Under that section Kenai would receive 25 per cent (25%) of such net revenue, the remaining 75 per cent (75%) would be paid to the United States Treasury to be expended for the management of the National Wildlife Refuge System.

Alaska sought a declaratory judgment that such revenue be distributed pursuant to 30 U.S.C. §§ 181, et seq., the Mineral Leasing Act of 1920 (R. 14). Under that act 90 per cent (90%) of the revenue would be distributed to the State and 10 per cent (10%) to the United States. Both Kenai and Alaska sought writs of mandate compelling the appropriate federal officials to distribute the revenue in a manner consistent with their respective statutory claims. In each suit the Secretary of the Interior sought a judgment declaring that the involved revenues be allocated pursuant to 16 U.S.C. § 715s. (R. 29).

The two separate actions were consolidated (R. 10) and after consolidation Kenai intervened in Alaska's suit and sought the same relief as in its original suit. (R. 38).

Ultimately all of the parties, Kenai, Alaska and the Federal defendants, filed motions for partial summary judgment. After briefing and oral argument, the United States District Court granted Alaska's motion for partial summary judgment.[1] Pursuant to that ruling judgment was entered in favor of Alaska on October 10, 1977. That judgment declared that the involved revenue be allocated between Alaska and the United States pursuant to 30 U.S.C. §§ 181 et seq.

The Federal defendants and Kenai appealed the District Court Judgment to the Court of Appeals for the

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[1] The motions were for partial summary judgment only on the issue of which statutory method of allocation applied to the revenues in questions. Other issues concerning the reallocation of revenues already distributed were not involved.

Ninth Circuit. By its judgment of February 5, 1980 the Court of Appeals affirmed the judgment of the District Court. (Kenai's Petition for Writ of Certiorari, Appendix B-2).

B. Statement of Facts

This dispute centers on the meaning of 16 U.S.C. § 715s, as amended on August 30, 1964 by Pub. Law 88-523, 78 Stat. 701-702. The 1964 amendment to 16 U.S.C. § 715s was a revision of a Wildlife Refuge Revenue Sharing Act. As first enacted on June 15, 1935, 49 Stat. 383, the Act distributed seventy five per cent of the net revenue derived from the sale of certain products of wildlife refuges to the county in which the refuge was located. The United States retained the remainder of the revenue. Proceeds from the sales of minerals were not specifically designated for distribution under the 1935 formula.

The 1964 amendment to 16 U.S.C. § 715s added the word "minerals" to the list of resources the revenue from which was to be distributed to counties under the Wildlife Revenue Sharing Act. In addition the 1964 amendment to 16 U.S.C. § 715s distinguished between revenue derived from reserved [2] land refuges and that derived from acquired [3] land refuges.

The Kenai National Moose Range is a reserved land wildlife refuge located wholly within the Kenai Peninsula Borough, Alaska. It was established on December 16, 1941, Executive Order 8979, 6 Fed. Reg. 6471 (R. 906). The refuge comprises of approximately 2 million acres, see *Udall* v. *Tallman*, 380 U.S. 1 (1965). Since 1959

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[2] Reserved land means an area withdrawn from the public domain and reserved as a Wildlife Refuge, 16 U.S.C. § 715s (g) (3), as amended in 1976.

[3] Acquired land means land which is acquired in fee by the United States and then administered as a Wildlife Refuge, 16 U.S.C. § 715s (g) (2), as amended in 1976.

revenue has been derived from Federal oil and gas leases on the Kenai National Moose Range. (R. 66-67; 229-230). From 1959 through 1976 approximately ninety per cent of that revenue was distributed to the State of Alaska and ten per cent to the United States (R. 230). These distributions have totaled approximately $57,239,586.03 (R. 949). Since 1976 the oil and gas lease revenues from the Kenai National Moose Range have been and are being held in a suspense account pending the resolution of this dispute (R. 231, 1133).

In 1975 the Director of the United States Fish and Wildlife Service requested an opinion from the Solicitor of the Department of the Interior as to whether the 1964 amendment to 16 U.S.C. § 715s required that receipts from oil and gas leases on reserved land wildlife refuges be distributed pursuant to 16 U.S.C. § 715s or whether they be distributed pursuant to 30 U.S.C. §§ 181 et seq., the Mineral Leasing Act. The Solicitor concluded that oil and gas revenues must be distributed in accordance with the 1964 amendments to § 715s irrespective of whether the refuge involved was a reserved land or acquired land refuge (Opinion, Solicitor Department of the Interior, Appendix D, Petition of Cecil D. Andrus et al., for Writ of Certiorari.)

The Solicitor for the Department of the Interior requested the Comptroller General for an opinion as to whether he concurred in the solicitor's opinion referred to above. In opinion B-118678, dated July 29, 1975, (Appendix E, Petition of Cecil D. Andrus, et al., for Writ of Certiorari), the Comptroller General concluded:

> ". . . that Congress intended the disposition of receipts from minerals on wildlife refuges to be governed by 16 U.S.C. § 715s as amended. We note that to hold otherwise as the Solicitor's memorandum points out would be to deprive § 715s (c) (1) of Title 16, prescribing a specific scheme of distribution for

> revenues from refuges created by reservation, of any meaning."

The State of Alaska, through its then Attorney General, sought a modification of the Comptroller General's opinion to reflect the States' position that oil and gas revenues from wildlife refuges on reserved lands be distributed according to the Mineral Leasing Act and not 16 U.S.C. § 715s (R. 190-197).

On June 11, 1976 the Comptroller General, upon reconsideration, affirmed his earlier decision (R. 211-221; Appendix F, Petition of Cecil D. Andrus et al for Writ of Certiorari). In his decision on reconsideration the Comptroller General stated in part:

> "the language of § 715s, as amended, compels a different conclusion [from that of Alaska]. It adds revenues from minerals to the fund established by subsection (a), and provides for distribution of net receipts in the fund, according to the formulas described in subsections (c)(1) and (c)(2), both to counties in which acquired refuges are situated and to those which reserved refuges are situated. There is no way to read this provision as excepting oil and gas revenues from the fund, but only to the extent they derive from refuges on reserved land, without doing violence to the plain meaning of the statute."

In addition the Comptroller General considered the arguments of Alaska that the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1624, compelled distribution pursuant to the Mineral Leasing Act. He found these arguments unpersuasive.

Since the parties were unable to agree upon a resolution of this dispute these suits followed.

ARGUMENT

1. ALASKA MISINTERPRETS THE "PLAIN MEANING" OF THE WILDIFE REFUGE REVENUE SHARING ACT, 16 U.S.C. §715s.

In a classic example of putting the cart before the horse, Alaska argues that this Court should apply the plain meaning of 30 U.S.C. §§ 181 and 191 to the facts of this case so as to achieve the result it advocates. It seeks to accomplish this by disregarding the mandate of 16 U.S.C. § 715s on the basis that the word "minerals" as used in that statute does not include oil and gas and therefore presumably cannot apply to the Kenai National Moose Range Revenues. Alaska's argument disregards numerous judicial decisions which include oil and gas within the term "minerals" (See cases cited at footnote 6, page 20, Kenai Opening Brief). In addition, Alaska disregards those statutes upon which it relies. Specifically, 30 U.S.C. § 181, part of the Mineral Leasing Act of 1920, includes oil and gas among the minerals to which it pertains. Likewise when Congress used the term "minerals" in the Mineral Leasing Act for Acquired Lands, it included oil and gas among those minerals covered, 30 U.S.C. § 352. For Alaska to argue that the term "minerals" in 16 U.S.C. § 715s does not include oil and gas is to disregard Congress' universal understanding of the term as shown in related legislation. Moreover, Alaska's argument that the plain meaning of 30 U.S.C. §§ 181 and 191 requires the application of those statutes to oil and gas revenues from Wildlife Refuges makes no sense if instead of oil and gas revenue another mineral, such as coal, were involved. Would Alaska then, by piecemeal, emasculate the term "minerals" in 16 U.S.C. § 715s by deleting coal, phosphate, sodium or any other mineral identified in 30 U.S.C. § 181 from the term minerals as used in 16 U.S.C. § 715s? Presumably Alaska would seek this result in order to achieve the application of the Min-

eral Leasing Act rather than the Wildlife Refuge Sharing Act. Carefully considered, Alaska is arguing that the term "minerals" in 16 U.S.C. § 715s includes every mineral except those enumerated in 30 U.S.C. § 181. Such an interpretation distorts the "plain meaning" rule beyond recognition and subjects Congress to an intent that can exist, if at all, only in the imagination of Alaska's attorneys.

2. THE LEGISLATIVE HISTORY OF THE 1964 AMENDMENT TO 16 U.S.C. § 715s DOES NOT SPEAK, ONE WAY OR THE OTHER TO THE ISSUE OF IMPLIED REPEAL.

There is no ambiguity in 16 U.S.C. § 715s as amended in 1964. Hence there is no room for construction of its terms, cf. *United States* v. *Wiltberger*, 5 Wheat. 76, 95-96, 5 L. Ed. 37, 42 (1820). Despite such lack of ambiguity, Alaska nevertheless resorts to legislative history in an attempt to show that Congress did not intend to repeal, by implication, the irreconcilable provisions of 30 U.S.C. §§ 181 and 191. Alaska relies almost solely on a table and its explanation [4] showing that no increase in revenues to Kenai was expected if the legislation were enacted. There is no basis shown for the projections in the table. The clearest explanation for the projections in the table is simply that they were erroneous. Indeed, Alaska admits that revenue projections of witnesses at the hearings before the 88th Congress, 2d Sess. were wrong (Alaska Brief p. 21 fn. 39) Congressional reliance upon erroneous projections by witnesses cannot be elevated to show a congressional intent to distort the plain meaning of its statutes so as to conform the statute to the erroneous testimony.

The bankruptcy of Alaska's argument on this point is shown by its interpretation of the term "minerals" in

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[4] S. Rep. No. 1919, pp. 4-10, 27th Congress, 2d. Session.

16 U.S.C. § 715s so as to include oil and gas if the refuge receipts are from acquired lands but not to include oil and gas if the refuge receipts are from reserved lands (Alaska Brief pp. 22-23). No reading of the statute can justify such a conclusion.

3. PAST ADMINISTRATIVE PRACTICE PROVIDES NO STANDARD BY WHICH TO INTERPRET 16 U.S.C. § 715s.

There is no dispute that the Department of the Interior distributed money from the Kenai National Moose Range, under the Mineral Leasing Act formula during the period prior to 1976. That fact cannot modify the clear language of 16 U.S.C. § 715s requiring a different allocation of revenue. Past administrative practice is useful in interpreting statutes or regulations where there is no ambiguity or unclarity, cf. *Udall* v. *Tallman*, 380 U.S. 1 (1965). However, in the case of the statute whose meaning is clear and direct administrative practice which is contrary to the direction of the statute is of no significance, *Enfield* v. *Kleppe*, 556 F. 2d 1139 (10th Cir. 1977).

Under these facts the administrative error must be, and indeed can be corrected. In this regard see argument and cases cited at pages 31-32 of the brief of the Federal Petitioners.

4. THE POSSIBILITY THAT THE EXECUTIVE BRANCH MAY WITHDRAW PUBLIC LANDS FOR WILDLIFE REFUGES CANNOT AFFECT THE INTERPRETATION OF 16 U.S.C. § 715s.

Alaska raises the spector that the intent of Congress to share mineral revenue with the states in areas not included within wildlife refuges can be frustrated by the executive withdrawal of public lands for wildlife refuges. The simple answer to this argument is that such after the fact events, if they do occur, cannot affect

the meaning of what Congress enacted in 1964. Beyond that, if Congress does perceive abuses of the Executive part to withdraw land for wildlife refuges purposes, it may remedy such abuses by legislation.

In reality, Alaska's argument on this point requires no response since it is speculative. Alaska does not point out any instance of the abuse it perceives even though 16 years have gone by since the enactment of the legislation herein involved. For this reason the argument should be regarded as specious and be disregarded.

5. THERE IS NO CONFLICT BETWEEN 16 U.S.C. § 715s AND THE ALASKA STATEHOOD ACT.

Contrary to Alaska's assertion, the Alaska Statehood Act does not require that all minerals disposed of by the United States from Alaska be distributed under 30 U.S.C. §§ 181, 191. What the Statehood Act does provide is that where the Mineral Leasing Act applies to any disposition of minerals, the State shall receive 90 per cent of the revenues received. § 28(b) of the Alaska Statehood Act, 72 Stat. 339, reads in part:

> [30 U.S.C. § 191] is hereby amended by inserting immediately before the colon preceding the first proviso thereof the following: ', and of those from Alaska 52 and ½ percent thereof shall be paid to the State of Alaska for disposition by the legislature.' "

Without that language Alaska's 52 and ½ per cent share would have otherwise been paid into the reclamation fund, a fund whose proceeds would not pass to Alaska. This is far different from stating that all minerals dispositions from Alaska be made pursuant to 30 U.S.C. § 191.

The interpretation of 16 U.S.C. § 715s advocated by the federal petitioners and the Kenai Peninsula Borough

will not result in the impoverishment of Alaska as suggested by the State at pages 29 through 30 of its brief. Indeed, even without the revenues of the Kenai National Moose Range, Alaska has recently enacted legislation repealing its personal income tax, § 9, Chapter 2, Special Sess., Statutes of Alaska 1980; § 10, Chapter 1, Special Sess., Laws of Alaska 1980, and enacted a permanent fund dividend. This simply shows that the amendment to the Mineral Leasing Act required by Section 28 (b) of the Alaska Statehood Act has accomplished Congress' intent with respect to providing a sound economic base for Alaska. This result has been achieved even when 16 U.S.C. § 715s has been interpreted so as to require distribution of Moose Range Revenues pursuant to its plain meaning.

CONCLUSION

Based on the foregoing argument as well as the argument in the opening brief of Kenai Peninsula Borough, the judgment of the Court of Appeals for the Ninth Circuit should be reversed and the matter remanded to the District Court with instructions to grant the motion of the Kenai Peninsula Borough for partial summary judgment.

DATED this 9th day of January, 1981, at Anchorage, Alaska.

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